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# Reading the Royal Email

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**Abstract:** Determining whether an exercise of constitutional executive power is a manifestation of the royal prerogative, or merely a new excuse for executive excess, is notoriously difficult to define. The royal prerogative remains elusive, notwithstanding a millennium of its exercise. Often its use is viewed as falling within the fringes of government action—honours and awards, the exercise of mercy, or the movement of troops around the country. Other times it has been abridged by statute: either explicitly or implicitly. Yet, its breadth and depth remain potent within modern Australia. This paper looks to address specifically the oft-reference and historically well-used prerogative of reading the royal mail. It does so to highlight the residual power that remains in section 61 of the Australian *Constitution,* and to provide a useful case study on the fine line between valid prerogative evolution and invalid expansion of executive power.

**Keywords:** Royal Prerogative; Royal Mail; constitutional Executive Power; Australian Constitution; Intelligence.

> If anyone will run over the pages of Comyn’s “Digest” or any other such book titled “Prerogative” he will find the Queen has a hundred such powers which waver between reality and desuetude: and which would cause a protracted and very interesting legal argument if she tried to exercise them. Some good lawyer ought to write a careful book to say which of these powers are really useable, and which are obsolete. There is no authentic explicit information as to what the Queen can do, any more than of what she does.[1]

As Sir Walter Bagehot notes, the exact nature and ambit of the royal prerogative is notoriously hard to capture. This is, of course, separate to any difficulties *defining* the royal prerogative, which has occupied much of the literature in the past half-century (deriving from debates between the supporters of Dicey or Blackstone). One of the critical issues with relying upon the royal prerogative is the common law does not create it. It merely recognises its continued existence since the Glorious Revolution of 1688. This can lead to some nuanced complexities that legal practitioners rarely come across unless they work or research in

[1] Walter Bagehot, *The English Constitution*, 75.

this area, in particular the impact that a new prerogative being recognised across the Commonwealth can have in Australia (notwithstanding our sovereign legal system).

Whilst this paper is by no means an attempt to fulfil the request for a "careful book," there is merit in a "careful paper" that addresses one prerogative power that practically wavers between reality and desuetude: the prerogative of reading the mail. It is practical in that, prior to bespoke legislation for intelligence services, it would appear to have been relied upon across the Commonwealth for a suite of intelligence gathering operations. It is also practical in demonstrating the current gap in judicial commentary and academic research on how the prerogative can evolve—in this case, from the letters of the eighteenth century to the emails of the twenty-first century.

This paper begins ("The Royal Prerogative & the Common Law") with a brief explanation of how constitutional executive power in Australia is constructed. This is for two reasons. First, the author is Australian and trained in Australian constitutional law. Second, Australia's constitution remains tied to the royal prerogative through its colonial past and contemporary Commonwealth history. It provides a useful, but not unique, case study in the construction of executive power. By looking outside British case law, studies in the power of the Crown can also trace a pan-Commonwealth tradition. The royal prerogative is uniquely important in a practical sense because it can be relied upon for what might otherwise be a breach of law. It is necessary because non-statutory executive power, whilst well researched in academia, is often not practically understood outside of niche circles. The paper then turns ("A History of Communication Interception") to a legal historical exploration of the interception of mail under the royal prerogative, starting in the era prior to 1688 for reasons expanded upon below. The paper then ("So What? The Evolution of the Prerogative") addresses how to assess when the prerogative has evolved and canvasses two possible tests: Public Policy and Originalism. The paper does not address how or when a prerogative is abridged as it is focused merely on its possible existence and directs readers elsewhere for a more general discussion on abridgment. It further does not address any application in a federal construct, this being outside the scope of this paper. It is only concerned with the vexing, but critical, question of whether the prerogative exists and its evolution. This paper is not concerned with the royal mail prerogative's interoperability with other prerogative powers, such as the power to keep the peace.

**The Royal Prerogative & The Common Law**

Sir William Blackstone was not the first to describe the royal prerogative, but he was the first to attempt to do so comprehensively. Blackstone declares:

> By the word prerogative we usually understand that special pre-eminence which the King hath, over and above all other persons, and out of the ordinary course of common law, in right of his regal dignity… it can only be applied to those rights and capacities which the King enjoys alone, in contradiction to others, and not to those which he enjoys in common with any of his subjects.[2]

Such a position reflects the theocratic nature of the Crown, a power that is only exercised by the Monarch and the Monarch alone. A. V. Dicey rejected this and accused Blackstone of “applying old and inapplicable terms to new institutions, and especially of ascribing in words to a modern and constitutional King the whole, and perhaps more than the whole, of the powers actually possessed and exercised by William the Conqueror.”[3] Dicey proposed alternatively that:

> The prerogative appears to be historically and as a matter of fact nothing else than the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown. The prerogative is the name of the remaining portion of the Crown's original authority … Every act which the executive government can lawfully do without the authority of an Act of Parliament is done in virtue of the prerogative.[4]

Such a position reflects a more mundane and human approach to the power. Dicey is popular in the United Kingdom,[5] but as Munro has noted it is a rather careless articulation which has proven unfortunately resilient.[6] It fails to acknowledge the concept of the duality of the Crown. In comparison, Blackstone’s strict approach is supported in Australian case law and will accordingly be adopted here.[7]

There are alternative ways to categorise the royal prerogative: via the basis of its source; the effect the prerogative power has; or along a Montesquieuan taxonomy.[8] Within

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[2] Blackstone, *Commentaries on the Laws of England*, 1:232; cited with approval in *Davis v Commonwealth*; *Plaintiff M68v Minister* .

[3] Dicey, *The Law of the Constitution*, 8.

[4] Dicey, *Law of the Constitution*, 424–425.

[5] *Attorney-General v De Keyser’s Royal Hotel*; *Burmah Oil v Lord Advocate*.

[6] Colin Munro, *Studies in Constitutional Law,* 160.

[7] *Federal Commissioner of Taxation v Official Liquidator*; *Davis v Commonwealth* (n 2); *Plaintiff M68 v Minister* (n 2).

[8] Noel Cox, *The Royal Prerogative and Constitutional Law*, 47–48. Another line of academic thinking divides the prerogative power into two classes: one that is Germanic, and the other Roman. Chief Baron Fleming in

Australia, H. V. Evatt expanded on his seminal doctoral work whilst sitting on the bench, where His Honour suggested the prerogative can fall within three categories.[9] The first category is what was titled “executive prerogatives,” which allowed the Commonwealth to perform acts such as declaring war, coining money, acquiring territory and granting pardons.[10] These prerogatives can also be linked to Germanic traditions. The second form of prerogatives that Evatt J titled were “common law prerogatives,” being those prerogative powers linked to the Crown as a person—such as legal immunities and exceptions.[11] The third class of prerogatives were titled “priority rights” which included rights to royal metals, and land.[12] This division of the royal prerogative was adopted with approval in the United Kingdom,[13] and has advantages in particular with denoting executive prerogatives which are applicable in federal, or unitary, systems.

It may shock individuals just how wide this remaining residual power, or the rights and capacities really are. It extends across immunities, capacities and historic rights of priority; to the military and armed forces and their daily operation; to the minerals in the soils. Under the royal prerogative, the King could dismiss all the officers from the Governor-General down; or could appoint any individual as an officer. The prerogative of war allows for operations to be declared unilaterally in order to conquer land, and is “the only source of authority to kill or capture an enemy in war.”[14] Equally, under the prerogative of peace any or all part of Australian territory could be sacrificed to another State or non-State group in order to cease hostilities. Likewise, the royal prerogative of mercy could allow for every offender to be pardoned, regardless of their guilt;[15] and every Australian could be appointed a Member of the Order of Australia.

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*Bates’ Case* divided prerogative power into “the ordinary” and “the absolute,” (1606) 2 St. Tr. 371, 389; Blackstone (n 2) Book 1, 239–240 divided them into “incidental” and “direct”; Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown* divided the powers into what he viewed as local, and others which were fundamental rights on which authority rested and were necessary to maintain it; and more recently Sir William Wade divided them into “simplistic” and “eccentric” in “Procedure and Prerogative in Public Law,” 180–199.

[9] For the doctoral work, see Evatt, *The Royal Prerogative*. For the case law, see *Federal Commissioner of Taxation v Official Liquidator* (n 7).

[10] *Federal Commissioner of Taxation v Official Liquidator* (n 7) 320–321.

[11] *Federal Commissioner of Taxation v Official Liquidator* (n 7) 322.

[12] *Federal Commissioner of Taxation v Official Liquidator* (n 7) 322.

[13] House of Commons Public Administration Select Committee, *Taming the Prerogative,* 5–6.

[14] Moore, “Military Law and Executive Power,” 98.

[15] *Ogawa v Attorney-General.*

<u>The General Rule</u>

When analysing executive power within Australia, it has become common practice to adopt the distinction, drawn by Professor George Winterton, between the “breadth” and “depth.”[16] This practice was adopted by Gageler J, who explains “breadth” to relate to “the subject-matters with respect to which the executive government of the Commonwealth is empowered to act having regard to the constraints of the federal system”[17] whilst depth denotes “the precise actions which the Executive Government is empowered to undertake in relation to those subject matters.”[18] It can moreover be understood to limit the Commonwealth executive government’s ability to undertake coercive activities. The reference to “coercive activities” in turn reflects a number of fundamental constitutional principles, many of which derive from English case law and core constitutional documents such as *Magna Carta* of 1215, the *Petition of Right* of 1628, *Habeas Corpus Act* of 1640, *Bill of Rights* of 1689 and *Habeas Corpus Act* of 1816. As Brennan J observed in *Re Bolton: Ex parte Beane*:

> Many of our fundamental freedoms are guaranteed by ancient principles of the common law or by ancient statutes which are so much part of the accepted constitutional framework that their terms, if not their very existence, may be overlooked until a case arises which evokes their contemporary and undiminished force.[19]

These fundamental constitutional principles were developed in the context of historical struggles between the Crown and the Parliament of England, which resulted in the Parliament establishing limits on the executive government’s non-statutory power in the Glorious Revolution of 1688. Critically, these limitations are most severe when it comes to the *internal*, rather than *external*, aspects of society.

Several of these principles relate directly to the armed forces and continue to be relevant today. For example, three members of the High Court recently observed, in a separate context:

> The considerations that informed the measures established by Parliament upon its victory over the Crown [the Glorious Revolution] remain of abiding concern today. A modern standing army, like its precursors, consists of people who are empowered with ‘the skills, knowledge and

[16] Winterton, *Parliament, The Executive and the Governor-General*, 21.

[17] *Plaintiff M68 v Minister* (n 2) 130 (Gageler J).

[18] *Plaintiff M68 v Minister* (n 2) 130 (Gageler J).

[19] *Re Bolton: Ex parte Beane*, 520–521.

> weaponry to apply lethal force. If Army members engage in ill-disciplined use of violence at home or at work, then Army’s confidence in them to execute their duties lawfully and discriminately in circumstances of immense stress on the battlefield is deeply undermined.’ This consideration may be thought to be even more compelling today than during the constitutional struggles of the seventeenth and eighteenth centuries.[20]

In light of these fundamental constitutional principles, it is clear that in the absence of legislation the Commonwealth executive government generally has no power to create new offences.[21] It also generally has no power to impose obligations or compel behaviour (including producing documents or information),[22] or to levy taxes.[23] In addition, the Commonwealth executive government is subject to requirements under the general law (including the common law and statute), unless its conduct is authorised by legislation or otherwise lawfully justified.[24] The reference to conduct which infringes the “law” includes statute law and the common law.[25] This includes (among other rights) the common law right to bodily integrity protected by the torts of negligence and trespass,[26] the common law right to liberty protected by the tort of false imprisonment and the writ of habeas corpus,[27] and common law rights in relation to private property protected by the tort of trespass and other torts.[28]

This principle finds its antecedents in the eighteenth century decision in *Entick v Carrington*. John Entick’s house was entered and sacked, without warrant, by the King’s Chief Messenger, Nathan Carrington. Carrington’s defence was that he was under orders by Lord Halifax, the newly appointed Secretary of State for the Northern Department. The search was conducted in the hope of finding incriminating, seditious pamphlets. None were found, and Entick sued for trespass. The Court held that the entry was illegal and the

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[20] *Private R v Cowen* (2020) 271 CLR 316, [75].

[21] See, for example, *Davis* (n 2) 112 (Brennan J); *Williams (No 1) v Commonwealth*, [135] (Gummow and Bell JJ).

[22] *McGuinness v Attorney-General (Vic)*; *Victoria v Commonwealth*, 481 (Mason J).

[23] *Williams (No 1) v Commonwealth* (n 21).

[24] See, for example, *Clough v Leahy* , 155–156 (Griffith CJ); *Pirrie v McFarlane* ; *Shaw Savill and Albion Co v Commonwealth*, 355 (Starke J); *A v Hayden*, 540 (Gibbs CJ), 562 (Murphy J), 582, 588–589, 591 (Brennan J), 593 (Deane J); *Re Tracey: Ex parte Ryan*, 575–576 (Brennan and Toohey JJ); *Re Residential Tenancies Tribunal (NSW) v Henderson: Ex parte Defence Housing Authority*, 427–429 (Brennan CJ), 442–444 (Dawson, Toohey and Gaudron JJ), 472–473 (Gummow J); *Plaintiff M68 v Minister* (n 2) 91 (Gageler J).

[25] See, for example, *Plaintiff M68 v Minister* (n 2) [159] (Gageler J).

[26] *Binsaris v Northern Territory*, [25] (Gageler J).

[27] *Plaintiff M68 v Minister* (n 2) [162] (Gageler J).

[28] *Coco v R*, 435 (Mason CJ, Brennan, Gaudron and McHugh JJ).

Secretary of State could not order searches of private property without authority conferred by an Act of Parliament or the common law.[29] *Entick* reflects a watershed moment in the common law, for establishing a firm limit on executive power.[30] The case is of particular importance in the below discussion of British case law with respect to the prerogative of reading mail.

The ratio of *Entick* was transferred to Australia in the decision of *A v Hayden*.[31] In that case, Australian Secret Intelligence Service (ASIS) officers and employees, and an army representative, were directed to participate in a security training exercise, which involved freeing a “hostage” from a hotel room in Melbourne. The training exercise went awry (the officers stormed the wrong hotel room) and it was alleged that ASIS had committed criminal offences under Victorian legislation. There was no Commonwealth legislation which authorised the relevant conduct or provided an exemption from the Victorian legislation. The High Court emphasised that simply because the Commonwealth had authorised the training did not excuse the ASIS officers of criminal offences. Chief Justice Gibbs emphasised “[i]t is fundamental to our legal system that the executive has no power to authorise a breach of the law and that it is no excuse for an offender to say that he acted under the orders of a superior officer.”[32]

These three key rights—bodily integrity, freedom from false imprisonment, and protection of one’s property—can be heavily impacted by internal exercises of constitutional executive power. There are some clear, and some more opaque, examples of this. Some clear corresponding examples include the use of force by military personnel in breaking industrial actions,[33] the detention of individuals as enforcement of quarantines, and the hacking of computers and downloading of personal information. Some more opaque examples include the use of intelligence, surveillance and reconnaissance assets for passive data collection; the presence of military personnel as a show of force; or the copying (rather than destruction or alteration) of data from personal computers. All of these latter examples may readily fall under a practical exercise of the prerogative of reading the mail.

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[29] *Entick v Carrington* (n 29).

[30] The case was later applied in *A v Hayden* (n 24), to extend the principle within the Australian common law jurisdiction.

[31] *A v Hayden* (n 24).

[32] *A v Hayden* (n 24) 540.

[33] White, “Military Intervention in Australian Industrial Action,” 423.

These three key rights are often enforced by the principle that the Commonwealth is subject to the general law. This is not simply a matter of potential exposure to civil or criminal liability but also signals the limits of the Commonwealth’s non-statutory executive power. Justice Gageler has described this as a matter of “inherent constitutional incapacity.”[34] In *A v Hayden*,[35] Murphy J stated:

> The Governor-General, the Federal Executive Council and every officer of the Commonwealth are bound to observe the laws of the land. *If necessary, constitutional and other writs are available to restrain apprehended violations and to remedy past violations*.[36]

Having regard to these principles, the general rule is that the Commonwealth executive government does not have power to engage in conduct that would infringe rights protected by the common law, in the absence of legislative authority or another lawful justification. Yet, all rules hold exceptions, and the depth of Commonwealth executive power is no different. In the absence of legislative authority, the High Court has indicated that the Commonwealth executive government only has power to interfere with the legal rights of other persons if it is exercising its **prerogative** powers. In *Plaintiff M68/2015 v Minister for Immigration and Border Protection*, Gageler J stated:

> An act done in the execution of a prerogative executive power is an act which is capable of interfering with legal rights of others... Subject to statute, and to the limited extent to which the operation of the common law accommodates to the continued existence of ‘those rights and capacities which the King enjoys alone’ and which are therefore properly to be categorised as prerogative, the Executive Government must take the civil and criminal law as the Executive Government finds it, and must suffer the civil and criminal consequences of any breach.[37]

Leslie Zines has similarly commented that the Commonwealth’s prerogative powers, such as declarations of war and peace, the alteration of national boundaries, acts of state, the pardoning of offenders, and various immunities and privileges, are capable of interfering with the legal rights and duties of others.[38]

Yet, as Bagehot and others have flagged, correctly identifying and relying upon a prerogative power is particularly difficult. This is mainly due to historic barriers to judicial

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[34] *Plaintiff M68 v Minister* (n 2) [159], [162] (Gageler J).

[35] *A v Hayden* (n 24).

[36] *A v Hayden* (n 24) 562 (emphasis added). See also *Marks v Commonwealth*, 565 (Windeyer J); *Habib v Commonwealth*, [129] (Jagot J).

[37] *Plaintiff M68 v Minister* (n 2) [135].

[38] Zines, *The High Court and the Constitution*, 345–346. See further Zines, “The Inherent Executive Power of the Commonwealth,” 279, 280.

review of an exercise of the prerogative, a barrier now removed due to jurisprudential development. One must turn, then, to legal history. Key amongst them is legal history. As W. S. Holdsworth noted, legal history is “necessary to the understanding and intelligent working of all long established legal systems,”[39] a point “particularly true when examining constitutional rules”[40] especially British constitutional concepts, that are “original and spontaneous, the product not of deliberate design but of a long process of evolution.”[41] It further can act as an aid in challenging assumptions that are commonly made about constitutional arrangements; nowhere is this more pertinent than the royal prerogative.

The Glorious Revolution of 1688 was the culminating point in a series of power clashes about the regulation of the royal prerogative. Although not the first instance of prerogative power being subjugated to it, it was the final scene in a series of contests: it took a judgment by the courts, the abolition of the Star Chamber by Parliament in 1641, a civil war, and a revolution to confirm.[42] So-called Glorious for its bloodless nature, 1688 saw a change in dynasty (from the House of Stuart to William III) under the invitation of Parliament. Although William and his wife, Mary, inherited “a panoply of legal powers as ample as that borne by their two immediate predecessors”[43] the subsequent *Bill of Rights* established, beyond doubt, the supremacy of Parliament. It only abolished two prerogatives—a standing army, and the power to suspend Acts of Parliament. Yet in doing so, it firmly established parliamentary supremacy and froze the powers of the Crown. The *Bill* implemented into formal law the political reality of England: the Crown’s growing subservience to Parliament.[44]

From a legal historical perspective, the real effect of the Glorious Revolution was that the Sovereign’s powers could only be used in accordance with convention and the principle of responsible government.[45] This is important, for English Courts have accepted that the maximum scope of the royal prerogative is to be ascertained from this era, noting poetically that “it is 350 years and a civil war too late for the Queen’s court to broaden the

[39] Holdsworth, *Some Lessons from Our Legal History,* 8–9.

[40] Rosara, *The War Prerogative: History, Reform and Constitutional Design,* 7.

[41] Bogdanor, “Conclusion,” 719.

[42] *Case of Proclamations* (n 43).

[43] Keir, *Constitutional History of Modern Britain 1485–1937,* 269.

[44] Article 1 specifically limited the royal prerogative, holding that “the power of suspending the laws or the execution of laws by regal authority without consent of Parliament is illegal”; 1 Will III & Mary II.

[45] Marshall, *Constitutional Conventions*, 7–41.

prerogative."[46] Any discussion of prerogative powers must necessarily cover historical examples prior to 1688 where the powers were frozen.

## A History of Communication Interception

### Legal History

The history pertaining to the interception of mail is quite extensive but also shrouded in mystery. The first public reference to the warrant to open and read letters in the United Kingdom was in the Proclamation of 26 May 1663.[47] The Proclamation prohibited the public from opening others letters except by the immediate warrant from the Secretary of State.[48] The exercise of this power has been controversial, and in 1844 two committees were established in the United Kingdom to investigate the state of the law in respect of detaining and opening letters at the General Post Office.[49] This followed from a political scandal when the government was found to have intercepted letters of an Italian refugee, Joseph Mazzini.[50] The committees were established in both houses of parliament, one of the House of Commons and one of the House of Lords.[51] The Reports were conducted by a Secret Committee in both houses. Another committee similar to the 1844 committees would eventually be established in 1957 to discuss the law pertaining to the interception of mail and telephones. The two sets of committee reports discussed the following pertaining to the history of mail interception.

Prior to the Crown being the regular deliverer of letters for the Commonwealth, the Crown delivered its own mail, and a Master of Posts was appointed in 1516 to manage the Royal Post Office.[52] Seventy-four years later, in 1590 Elizabeth I ordered "all Mayors, Bailiffs... to make diligent search for all Mails... coming into or going out of the Realm with packets of Letters."[53] The purpose of this proclamation was to direct the delivering of mail

[46] *British Broadcasting Corporation v Hones*, 79 (Diplock LJ). However, in the *Case of Proclamations* in 1610 (prior to the Glorious Revolution) Coke held that the Sovereign could only exercise the prerogatives he had, and not create new ones: see *Case of Proclamations* (n 43).

[47] Birkett Committee, *Report*, at 9.

[48] Birkett Committee, *Report*, para. 9.

[49] Birkett Committee, *Report*, para. 11.

[50] Birkett Committee, *Report*, para. 11.

[51] Birkett Committee, *Report*, para. 11.

[52] Birkett Committee, *Report*, para. 14.

[53] *Report from the Secret Committee*.

through the Postmaster General and prevent the use of private mail delivering services,[54] but in doing so permitted the Crown to open and read mail. This proclamation appears to be the first authority that granted the Crown the right to open and read mail.

Following Elizabeth I’s proclamation, the Orders in Council of 22 November 1626 and 24 February 1627 also directed for the public conveyance of letters.[55] In 1635 the use of the Royal Messengers was formally opened to the general public by proclamation of Charles Stuart.[56] Although the proclamation appears to provide some guidance as to when the Crown took it upon itself to be the regular deliverer of mail, the Secret Committee could not find the exact date as to when the Crown became the regular deliverer of mail and held that the practice probably grew into a custom in “an early period.”[57]

Thereafter, in 1657 the first regular Post Office was officially established, and it was held that there was a requirement to detain and open letters to “discover and prevent any dangerous and wicked Designs against the Commonwealth.”[58] Bernard Keenan discussed this specific matter and the history of interception of letters by the Commonwealth in his thesis, which is summarised below.

During the English Civil War letters were frequently detained by both sides of the conflict.[59] By 1641 there were two Postmasters General, one for the Parliamentarians and one for the Royalists.[60] British citizens would be stopped on the roads and searched for letters, and captured letters were used for intelligence and propaganda.[61] For the purpose of spreading propaganda captured letters were sometimes published to the public during the conflict.[62] After the Civil War, in 1654 Cromwell issued an ordinance to establish the General Post Office.[63]

In 1657 Parliament codified the ordinance into statute.[64] It was this legislation that recognised, in the preamble, that the Crown had to establish a post office “to discover and

[54] Keenan, “Interception,” 62.

[55] Birkett Committee, *Report*, para. 15.

[56] Birkett Committee, *Report*, para. 16.

[57] *Report from the Secret Committee* (n 55).

[58] *Report from the Secret Committee* (n 55).

[59] Keenan, “Interception,” 63–64.

[60] Keenan, “Interception,” 63–64

[61] Keenan, “Interception,” 64.

[62] Keenan, “Interception,” 64.

[63] Keenan, “Interception,” 65.

[64] Keenan, “Interception,” 65.

prevent many wicked designs, which have been and are daily contrived against the peace and welfare of the Commonwealth, the intelligence whereof cannot well be communicated except by letters of escript.”[65] Evidently enshrining the purpose for which interception was exercised during the Civil War. To place the public under surveillance, to give the Crown a monopoly of the delivering of mail, and to identify and thwart rebels amongst the British populace. After the Glorious Revolution, the Crown chose to maintain the General Post Office.[66]

Following 1657, in 1710 the *Post Offices (Revenues) Act 1710* was passed. Section 40 of the Act prohibited the interception of mail except, *inter alia*, “by an express warrant in writing under the hand of one of the principal Secretaries of State for that purpose.”[67] However, the legislation merely recognised that the Crown had the right to open and read mail. It did not confer power to the Crown.[68]

The law pertaining to the interception of mail in 1710 was substantially similar as the subsequent Postal Acts passed in 1837, 1908 and 1953.[69] From 1710 through to 1844 the public discussion regarding the interception of mail appears to be somewhat dormant until the two committees of 1844 were established to discuss the legality of the matter.

Following from 1844 to 1981 various other reports were conducted by the United Kingdom government into intelligence gathering by state security services. This included in 1952 by David Maxwell-Fyfe, the report by the Birkett Committee in 1957, Lord Denning’s report on the Profumo Affair in 1963, Lord Harris in 1975, the White Paper in 1980, and Lord Diplock’s report in 1981.[70]

In South Australia, from as early as 1880, a Gazette publication from the Postmaster-General warned the public that all telegrams sent to Chile were to be intercepted, due to the continuing war at the time.[71] In Western Australia, a Royal Commission was conducted in 1899 into the Postal and Telegraphic services. In that report the Commission found that it was within the duties of a Mail Clerk to intercept mail.[72]

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[65] *An Act for setling the Postage of England, Scotland and Ireland 1657.*

[66] Keenan, “Interception,” 16.

[67] *Post Office (Revenues) Act 1710.*

[68] Birkett Committee, *Report*, para. 16.

[69] Birkett Committee, *Report*, para. 50.

[70] *R v Secretary of State for the Home Department: Ex parte Ruddock .*

[71] South Australia, *South Australian Government Gazette*, 137.

[72] *Royal Commission on the Postal and Telegraphic Service of Western Australia,* 131.

The Birkett Committee was established in the Privy Council in 1957 to investigate the interception of mail by the Crown in the United Kingdom. Similar to the two 1844 committees, the 1957 Committee was established to provide advice to the government in relation to the state of the law of mail interception, but also discussed telephone interception. The Committee concluded that “it is for Parliament to decide whether legislation should be introduced to make the unauthorised tapping of a telephone line an offence.”[73] Therefore submitting that a legislative backing may be preferable to regulate the interception of communication.

In 1979 it was discovered that the Crown had tapped James Malone’s telephone in a routine criminal prosecution. He challenged the constitutionality of the interception of his telephone. Mr Malone tried to argue that telephone tapping was unlawful on various grounds, but failed on the basis that “there was no law against” telephone tapping in the United Kingdom, and even though there was no conferral of power to the Crown to intercept telephone communications, it was permitted.[74] However, nothing was said on the prerogative.[75] The *Malone* decision sparked the need for the government to publish the White Paper in 1980.[76] In the White Paper, the government held that the existing practices provided adequate protection, and incorporating them into legislation would serve little purpose.[77] However, in 1984 *Malone* was appealed to the European Court of Human Rights which held that in the absence of a legislative basis the United Kingdom was in violation of article 8 of the European Convention on Human Rights.[78] Following this decision, the United Kingdom passed the *Interception of Communication Act 1985* (UK) to regulate the interception of communication.[79]

As can be seen above, the history pertaining to the interception of communication is extensive. The practice of intercepting communication is well established, but the question remains, what was the grant of power that permitted the government to intercept mail and what may it currently be? In the 1957 Birkett Committee report, and various other

[73] Birkett Committee, *Report*, para. 167.

[74] *Malone v Metropolitan Police Commissioner*.

[75] *Malone v Metropolitan Police Commissioner* (n 76) 359.

[76] UK House of Lords, “The Interception of Communications in Great Britain.”

[77] Cameron, “Telephone Tapping and the Interception of Communications Act 1985,” 130.

[78] *Malone v United Kingdom*.

[79] Keenan “Interception,” 18.

British authorities, they discussed what the source of power was that gave the Postmaster the right to intercept mail.

British Authorities

In the 1957 report various parties made submissions to the Birkett Committee. This included the Secretary of State for all of the Home Departments, the Lord Chancellor, the Attorney General and others.[80] Firstly, the Secretary of State submitted to the Privy Council that the right to intercept mail upon issuing a warrant was a prerogative right, and that as science has evolved, the right has expanded to intercepting telephone communications.[81] The opponents to the view that the power to open and read was a prerogative power tried to refute this point on two grounds.

To refute the point, the opponents firstly submitted that the prerogative right to open and read mail cannot be found in any literature.[82] In particular, Chitty’s *Prerogatives of the Crown* published in 1820,[83] which is considered to be a “comprehensive... view of every prerogative” did not mention the prerogative to open and read mail.[84] Second, in the case of *Entick*, the Court held that the practice of issuing general warrants was illegal and unconstitutional.[85] The opponents held that the warrants used to intercept telephone communications were similar to the general warrants issued in *Entick*.[86] However, the Secretary of State sought to distinguish this case on the basis that the general warrants in *Entick* were different from the specific warrant sought to intercept telephone communications.[87]

If not a prerogative right, then it was submitted that the right to intercept mail was grounded in the common law and it granted the Crown the right to prevent ill-disposed persons from misusing postal facilities.[88] However, this was dismissed on the basis that “it

[80] Birkett Committee, *Report*, para. 4.

[81] Birkett Committee, *Report*, para. 20.

[82] Birkett Committee, *Report*, para. 23.

[83] Chitty, *Prerogatives of the Crown.*

[84] Birkett Committee, *Report*, para. 23.

[85] Birkett Committee, *Report*, para. 23.

[86] Birkett Committee, *Report*, para. 23.

[87] Birkett Committee, *Report*, para. 25.

[88] Birkett Committee, *Report*, para. 27.

is difficult to distinguish [from the argument pertaining to the prerogative] save that the use of the word ‘Prerogative’ is avoided.”[89] Therefore, this submission should be ignored.

Alternatively, it was submitted that the right to intercept mail was a right grounded in the long and historical usage of the Post Office to intercept mail.[90] The Birkett Committee noted that it is understandable how this power may be called a prerogative right, as it is only the Crown that could intercept letters.[91] However, the Birkett Committee did not wish to call it a prerogative power. Although the power could not be properly named, it had existed and was being lawfully exercised by the Crown.[92] It was this position that the Birkett Committee appears to have supported.

It is submitted that the Birkett Committee was alluding to some sort of right to the contents of the Crown’s subjects mail due to a long historical acquiescence from the Crown’s subjects to the use of the Post Office to open and read mail. This view is formed on the basis that the Birkett Committee stated that “the opening and detaining of letters took place… upon the footing that those who entrusted their letters to the Posts would render them open to inspection at the wish of the Crown.”[93] It appears from the fact that the Crown’s subjects “entrusted” the Crown with their mail, and the Crown’s subjects ought to have known that the Crown could open and read their mail, but acquiesced to it nonetheless, that the Crown had the right to inspect their letters.

On that basis, the committee concluded that they favoured the view that the power to intercept telephone communication “rest[ed] upon the power plainly recognised by the Post Office statutes as existing before the enactments of the statute, by whatever name the power is described.”[94] They also stated that it is “difficult to resist that if there is a lawful power to intercept communications in the form of letters and telegrams, then it is wide enough to cover telephone communications as well.”[95] It seems clear that the Birkett Committee is willing to accept that the statutes did not confer the executive with the right to open and read mail, the statutes only recognised that the power existed. However, the Birkett Committee was not willing to name the power recognised by the legislation as a

[89] Birkett Committee, *Report*, para. 29.

[90] Birkett Committee, *Report*, para. 31.

[91] Birkett Committee, *Report*, para. 31.

[92] Birkett Committee, *Report*, para. 31.

[93] Birkett Committee, *Report*, para. 31.

[94] Birkett Committee, *Report*, para. 50.

[95] Birkett Committee, *Report*, para. 51.

prerogative power instead opting to ground the power in the long usage of the Post Office to intercept mail. To determine if this is the correct view, it is necessary to examine other academic sources.

Different authors have different opinions of the state of the law regarding the interception of mail. Vaughan Bevan opines that the Birkett Committee report did not recognise that such a right was recognised in statute or in the royal prerogative.[96] Instead opting to argue that government interference with the mail is unlawful. Although, submitting that the Birkett Committee did not recognise that the right to open and read mail was recognised in statute does not seem to accord with the ordinary language of the report.

Conversely, in Bernard Keenan's thesis, he opines that the 1844 committee reports and the 1957 Birkett Committee report stated that the statutes recognised that there was a prerogative to open and read mail.[97] Similar to Bevan, it is also submitted that Keenan's view does not accord with the ordinary language of the reports. Both authors relied on the findings of the Birkett Committee to ground their positions, rather than other sources, but both seem to have misunderstood what was held. As discussed, the Birkett Committee found that the power to open and read mail was recognised by statute and had been lawfully exercised, but the initial conferral of that power could not be properly identified beyond the historical usage of the Post Office to intercept mail. Perhaps the *Malone* case can provide a more concrete answer.

The *Malone* case went into great detail to discuss the legality of telephone tapping, although nothing was said on the prerogative.[98] In *Malone* Sir Robert Megarry VC held that England is not a country where everything is forbidden, but a country where everything is permitted except where it is expressly forbidden.[99] Therefore, the question as to whether telephone tapping was unlawful required asking whether there were any laws that prohibited its use. Various potential limitations were explored to see whether there may be a law that prohibits the interception of telephone lines. This included rights in property, trespass, a tort of privacy, rights pertaining to confidential information and rights conferred from the European Convention on Human Rights. None of these limitations were

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[96] Bevan, "Is Anybody There?" 436.

[97] Keenan "Interception," 253.

[98] *Malone v Metropolitan Police Commissioner* (n 76) 359.

[99] *Malone v Metropolitan Police Commissioner* (n 76) 359.

accepted as precluding the Crown from intercepting telephone communications.[100] Even without an express grant of power conferring the executive with the right to intercept telephone lines, without telephone interception breaching any laws, it could be done lawfully as there was no law against it.[101]

There is various academic discussion on this type of executive power. Jeff Simpson argued that this form of executive power is a "third source" of government power, with statute and the prerogative being the first two. Rather than relying on the need for parliament or the courts to grant power, the executive has residual power to act where it is not prohibited by the common law or legislation.[102] To summarise his position, he quotes Sir Granville Ran, a parliamentary draftsman, in which he stated

> A Minister of the Crown is not in the same position as a statutory corporation. A statutory corporation... is entirely a creature of statute and has no powers except those conferred upon it by or under statute, but a Minister of the Crown... is not a creature of statute and may, as an agent of the Crown, exercise any powers which the Crown has powers to exercise, except so far as he is precluded from doing so by statute.[103]

He submitted that this residual power is significantly different from the prerogative. The prerogative is capable of interfering with legal rights, but the third source is not capable of interfering with any rights.[104] In fact, it is subdued by any positive law that may interfere with its exercise.[105] From this position, in *Malone* although there was no direct grant of power, the residual power given to the executive government permitted the Crown to intercept telephone lines. Understood from an Australian context, it is submitted that Gageler J in *Plaintiff M68* summarised the position of the "third source" when he stated that

> An act done in the execution of a prerogative executive power is an act which is capable of interfering with legal rights of others. An act done in the execution of a non-prerogative executive capacity [third source], in contrast, involves nothing more than the utilisation of a bare capacity or permission, which can also be described as ability to act or as a "faculty." Such effects as the act might have on legal rights or juridical relations result not from the act being uniquely that of the Executive Government but from the application to the act of the same

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[100] *Malone v Metropolitan Police Commissioner* (n 76) 373.

[101] *Malone v Metropolitan Police Commissioner* (n 76) 388.

[102] Simpson, "The Third Source of Government Action Misconceived," 88; quoting Joint Committee on Statutory Instruments, *Eighth Report of Sessions 2007-08,* 16.

[103] Joint Committee on Statutory Instruments (n 104) 16.

[104] Joint Committee on Statutory Instruments (n 104) 16.

[105] Joint Committee on Statutory Instruments (n 104) 16.

> substantive law as would be applicable in respect of the act had it been done by any other actor. In this respect, the Executive Government “is affected by the condition of the general law.”[106]

In further support of the Australian adaptation of this methodology, Gageler J paraphrased *Heiner v Scott* in which Griffith CJ stated that

> In my opinion the carrying on of ordinary banking business is not a function of the executive Government of the Commonwealth conferred by the Constitution. It may be that the carrying on of such a business is not unlawful in the sense of being forbidden by law, but the liberty to do so cannot be regarded as anything more than a permissive faculty, permitted only in the sense of not being prohibited by positive law.[107]

Following from the *Malone* case, telephone interception was discussed again in *R v Secretary of State for the Home Department: Ex parte Ruddock*.[108] This matter was heard before Taylor J in the High Court, Queen’s Bench Division. John Idris Cox, a prominent member of the Campaign for Nuclear Disarmament and of the Communist Party, had his telephone tapped by the Security Service in August 1983. It is important to note that the telephone tapping was executed by the Security Service, but they applied to the Home Department and the Secretary of State for the warrant. Mr Cox argued that his telephone had been unlawfully intercepted and sought a quashing order in a judicial review of the decision to grant the warrant. The warrant was issued before the *Interception of Communications Act 1985* (UK) had come into effect on 10 April 1986. Taylor J held that the Secretary of State validly issued a warrant, importantly, pursuant to the prerogative.[109] However, he stated that the Security Service’s function is to maintain the defence of the realm, and a warrant should only be issued if there are reasonable causes to believe that there are major subversive activities that could injure national security.[110]

Rather than finding a broader prerogative to open and read mail, it appears that Taylor J is applying the prerogative to keep the peace of the realm. This is particularly interesting, noting the seminal case that recognised the prerogative duty and power to keep the peace was not formally recognised until two years later in *R v Home Secretary: Ex parte Northumbria Police Authority (“Northumbria Police Authority Trial”).*[111] Importantly, the

[106] *Plaintiff M68 v Minister* (n 2) [135] (Gageler J).

[107] *Heiner v Scott*.

[108] *R v Secretary of State for the Home Department: Ex parte Ruddock* (n 72).

[109] *R v Secretary of State for the Home Department: Ex parte Ruddock* (n 72) 1497.

[110] *R v Secretary of State for the Home Department: Ex parte Ruddock* (n 72) 1486.

[111] *R v Home Secretary: Northumbria Police Authority* [1987]; this was appealed as *R v Home Secretary: Ex parte Northumbria Police Authority*[1989]. See for an in-depth discussion White, *Keeping the Peace of the Realm* .

prerogative to keep the peace was described as being "a sister prerogative to the war prerogative," meaning that the depth of the power was almost plenary. Intercepting and reading mail—as part of wider intelligence requirements—would fall within this power.[112]

From the above authorities there appears to be four potential sources for grounding the executive's right to open and read mail. **First**, it is an executive capacity grounded in the long-term usage of the Post Office as a means of intercepting mail. **Second**, it is a general non-prerogative executive capacity (the third source). **Third**, it is found in the prerogative but is limited to circumstances pertaining to the defence of the realm. **Fourth**, it is found in the prerogative and applies broadly to all matters. It is pertinent to explore other common law jurisdictions to determine the appropriate grant of power.

## Australian Authorities

In 1977 the Commonwealth of Australia conducted a Royal Commission into Intelligence and Security. The need for a Royal Commission followed from the long-term mismanagement of reforming the Australian Security Intelligence Organisation (ASIO), and the short-term trigger of leaked documents from ASIO that discredited the former Deputy Prime Minister, Jim Cairns.[113] In the Royal Commission, they discussed the state of the law pertaining to mail interception. The Commissioner was of the view that the right to open and inspect mail was not a prerogative right.[114]

The Commissioner favoured this view as the *Post and Telegraph Act 1901* (Cth) prohibited persons from opening mail.[115] Although the Commissioner does note that there was a form that seems to have permitted the Postmaster-General to issue a warrant to open mail, the Commissioner held that the Postmaster-General likely did not actually have this power.[116] There are some contentions that need to be raised with the Commissioner's view that there is no prerogative right to open and read mail.

Simply because there may be a limitation on the exercise of the prerogative power does not mean that such a right does not exist. It is imperative to prove existence of the prerogative then examine the potential limitations. Additionally, it is also necessary to ascertain whether the legislation applied to the exercise of any sort of prerogative power.

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[112] As supported in Canada: see Lagassé, "Defence Intelligence Prerogative."

[113] Coventry, "Origins of the Royal Commission on Intelligence and Security," 73.

[114] *Royal Commission into Intelligence and Security* , 1:84.

[115] *Royal Commission into Intelligence and Security*, 1:85, n. 116.

[116] *Royal Commission into Intelligence and Security* , 1:85 n. 166.

Considering the fact that there was a form which permitted the Postmaster-General to issue a warrant to open mail may indicate an intention from parliament not to limit the power that the Postmaster-General had to open mail. Therefore, the Commissioner’s position should be viewed with caution.

In 1986 the Royal Commission of Inquiry into Alleged Telephone Interceptions was conducted.[117] *Inter alia,* the Royal Commission discussed the law regarding the interception of communication. In that investigation, the Commissioner discussed the 1957 Birkett Committee report. The Commissioner held that the Birkett Committee report did recognise that there was a prerogative right to open and read mail, and that it likely extended to telephone interception.[118] The Commissioner then stated that the common law position at the time, that there was a prerogative to intercept communication, was the state of the law in Australia prior to 1960.[119] Although this is an authority in Australia that recognises that there is a prerogative to open and read mail, it does not seem to accord with the ordinary language of the Birkett Committee report. As discussed above, it is submitted that the Birkett Committee did not conclude that the prerogative was the source of power that granted the Crown the right to open and read mail. Nevertheless, the Royal Commission is an authority that supports the position that there is a prerogative to open and read mail.

<u>New Zealand Authorities</u>

Crowder in 1978 discussed the state of the law of intercepting communication in New Zealand in his thesis. Crowder opines, as is submitted by this author, that the Birkett Committee affirmed the legality of the power but could not definitively name the source of the power.[120] Crowder noted, as is supported by this author, that if the prerogative existed in the United Kingdom, then there is no reason why it would not exist in New Zealand.[121] Crowder also discussed the various submissions made to the Birkett Committee as to what the source of power was that permitted the Crown to open and read mail.[122]

Crowder discussed the submission made to the Birkett Committee regarding the historical usage of the Post Office to intercept mail. On Crowder’s reading of the Birkett

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[117] *Royal Commission of Inquiry into Alleged Telephone Interceptions*.

[118] *Royal Commission of Inquiry into Alleged Telephone Interceptions*, 55.

[119] *Royal Commission of Inquiry into Alleged Telephone Interceptions*, 55.

[120] Crowder, “The Security Intelligence Service Amendment Act,” 146.

[121] Crowder, “The Security Intelligence Service Amendment Act,” 147.

[122] Crowder, “The Security Intelligence Service Amendment Act,” 147.

Committee report, he stated that the long usage of the custom, canvassed with the recognition by statute and the absence of legal prohibition grounded the right to open and read mail, in the view of the Birkett Committee.[123] On this point, however, it is important to note that the Birkett Committee stated that "the opening and detaining of letters took place... upon the footing that those who entrusted their letters to the Posts would render them open to inspection at the wish of the Crown."[124] The grounding of the power is not purely on long-term usage, but it was tied to the notion that the Crown was entrusted with letters and therefore had a right to inspect them. Additionally, as Crowder noted, "[l]ong [u]sage does not of itself establish legal authority,"[125] so this in of itself is not the source of power, but it was the long-term acquiescence from the Crown's subjects which led to the lawfulness of the custom.

While discussing the submissions made in the Birkett Committee, Crowder also examined whether the right to open and read mail could be lawful because there was no law against it. It is important to note that Crowder discussed this issue prior to *Malone* being decided. In relation to mail he states that there are clear prohibitions against the unauthorised opening of mail.[126] However, in relation to telephone tapping, there were no clear protections in the United Kingdom. He also highlighted that because there were no prohibitions the Crown believed that the right to intercept telephone communications was a power possessed by any phone operator as it was not contrary to law.[127] This was the position of the Crown in relation to telephone interception until 1937 when it was thought that the power to issue warrants to intercept mail was broad enough to capture telephone communications.[128] Although this position supports the notion that the prerogative was not the source of power, Crowder was also of the view that the absence of legislative prohibition may be evidence of a prerogative power to intercept telephones.[129]

Crowder's article also discussed the findings of the Chief Ombudsman report in 1976. The Chief Ombudsman was of the view that the prerogative was **not** the basis for permitting the government to intercept mail.[130] In fact, the Chief Ombudsman was of the

[123] Crowder, "The Security Intelligence Service Amendment Act," 147.

[124] Birkett Committee, *Report*, para. 31.

[125] Crowder, "The Security Intelligence Service Amendment Act," 147.

[126] Crowder, "The Security Intelligence Service Amendment Act," 149.

[127] Crowder, "The Security Intelligence Service Amendment Act," 149.

[128] Crowder, "The Security Intelligence Service Amendment Act," 149.

[129] Crowder, "The Security Intelligence Service Amendment Act," 149.

[130] Crowder, "The Security Intelligence Service Amendment Act," 146.

view that there was no authority at all.[131] However, the Chief Ombudsman did qualify this by stating that "there is no legal basis for the interception by postal authorities... in times of peace." Although not expanded on, this could mean that during times of war, the Crown can exercise the prerogative to intercept mail.

Nevertheless, Crowder was also of the view that there was no legal basis for intercepting mail as he submitted that the Birkett Committee was only willing to affirm its existence, but not dispel with the obscurity of its legal basis.[132] He also stated that the Birkett Committee may have been inclined to recognise the lawfulness of the Crown's right to intercept mail because of the long usage and acceptance of the practice, even though there may have been no real legal grounding for the power.[133]

Crowder's critique followed recognition of the prerogative of keeping the peace, with little grounding in the legal history of the exercise of the prerogative power.[134] This article has demonstrated clear precedent, prior to and at 1688, of intercepting royal mail. It further undermines Crowder's wide, but shallow, critiques of the potential bases of the power to intercept mail. The discussion pertaining to the prerogative was no more than half a page, and there was no discussion pertaining to non-prerogative executive capacities. Therefore, it is necessary to conclude, despite Crowder submitting there is no basis, whether there is a legal grounding for the Crown to open and read mail.

## Source of Power

### *Historical Usage of the Post Office to Open and Read Mail*

From the above authorities it is necessary to discuss whether the right to open and read mail is grounded in what was referred to as the historical usage of the Post Office to intercept mail. As discussed, the Birkett Committee was most inclined to the position that the Crown's subjects, in some way, acquiesced to the interception of mail when they entrusted the Crown with their letters.[135] This position was grounded in the historical monopoly created by the Crown in 1657 and 1660. The view being that the Crown was given

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[131] Crowder, "The Security Intelligence Service Amendment Act," 146.

[132] Crowder, "The Security Intelligence Service Amendment Act," 150.

[133] Crowder, "The Security Intelligence Service Amendment Act," 150.

[134] Crowder's article was published before the formal recognition of the prerogative to keep the peace in *R v Home Secretary: Ex parte Northumbria Police Authority* [1987].

[135] Birkett Committee, *Report*.

some sort of interest in the contents of the letter by its writer when the writer entrusted the Crown to deliver its letter.

Although, there are some contentions to this point. In particular, the historical analysis of the power to intercept mail seems to highlight a lack of entrustment from the writer. In 1590 Elizbeth I required all letters to be detained, irrespective of whether the letter was delivered through private means or by the Crown.[136] During the Civil War, letters would be intercepted on the physical persons of British subjects and would be published to the public even when the Post Office had not been used to deliver the letter.[137] While it may still be reasonable to argue that the writer of letters did entrust the Crown to deliver their letters and examine the contents of those letters, in some circumstances, it does not appear that it existed in all circumstances. Therefore, this is unlikely to be the source of power.

Following from *Plaintiff M68* the general understanding of executive power is that it falls into one of three categories: statutory executive power, the prerogative power and non-prerogative executive capacities.[138] If it were argued that the Crown had a right to open and read mail because of the long use of the Post Office to intercept mail, this type of executive power could only be classified as a non-prerogative executive capacity. The interest in the contents of the letters was not granted from statute, nor does this argument relate to the prerogative. If the Crown was entrusted with the contents of the letter, then understood from a modern context the power would need to fall under the category of a non-prerogative executive capacity. Maybe, as evidenced from the authorities discussed, instead of being a limited specific capacity of the executive government perhaps the Crown had a broad capacity, not linked to entrusting the Crown with delivering mail, to open and read mail. Rephrased differently, rather than being a capacity of the government which requires that the letters of the mail be entrusted to the Crown, perhaps it had a capacity to look at any letter for any reason.

### *Non-Prerogative Executive Capacity*

The *Malone* case favours the view that the Crown had the right to intercept telephone messages because there was no law against it.[139] This form of executive power is similar to what was described as a permissive faculty in *Heiner* and subsequently described as a non-

[136] *Report from the Secret Committee*, n. 55.

[137] Keenan, “Interception.”

[138] *Plaintiff M68 v Minister* (n 2).

[139] *Malone v Metropolitan Police Commissioner* (n 76).

prerogative executive capacity in *Plaintiff M68*.[140] The question, therefore, becomes whether the Crown's right to open and read mail was a non-prerogative executive capacity. Distinguishing between the prerogative and a non-prerogative executive capacity has its challenges. However, there is a clear factor that distinguishes the two forms of executive power. The prerogative power is capable of interfering with legal rights while a non-prerogative executive capacity cannot operate where there is a positive law that prohibits it.[141] Therefore, it is necessary to re-examine the submissions made in *Malone* to determine if a positive law interfered not only with the exercise of telephone interception, but whether at any stage in history the Crown intercepted mail notwithstanding a positive law prohibiting it. If the power to intercept mail never interfered with legal rights, and it was not capable of interfering with legal rights, then following the tripartite analysis of executive power the right to intercept mail would have to be a non-prerogative executive capacity.

In 1590 Elizabeth I required all Bailiffs, Mayors etc. to search for all mail coming into or going out of the realm.[142] Subsequently, during the Civil War British subjects would be searched on their physical persons for any mail.[143] Therefore, it is submitted that the power to open and read mail was exercised in a manner that interfered with the legal right of British subjects to bodily integrity. It is well established that "any touching of another person, however slight may amount to a battery,"[144] and "the least touching of another in anger is a battery."[145] Prior to 1688, it was within the scope of executive power to search for mail on the physical persons of British subjects as evidenced by historical accounts in 1590 and during the Civil War. The executive could commit a battery to search for mail. In these instances, the right to open and read mail could not have been a non-prerogative executive capacity of the Crown as it interfered with the right to bodily integrity.

It is also submitted that intercepting mail interfered with rights pertaining to confidential information. In *Malone* Megarry VC held that there was no right of confidence in relation to telephone communications as telephone conversations are analogous to that of blurting out information into the public, therefore, it is not afforded any protection by

[140] *Heiner v Scott* (n 109); *Plaintiff M68 v Minister* (n 2).

[141] *Plaintiff M68 v Minister* (n 2).

[142] *Report from the Secret Committee*, n. 55.

[143] Keenan, "Interception."

[144] *Rixon v Star City*, [63] Sheller JA.

[145] *Cole v Turner*.

equity.[146] However, the interception of mail is significantly different, as unlike telephone communications, mail is specifically intended to be received by the recipient. The delivering of mail is done in a private manner and cannot be said to be the equivalent of blurting out information. Additionally, Vaughan Bevan was of the view, despite the reasoning of *Malone*, that there is a clear difference between information blurted out into the public, and a private telephone conversation.[147]

Megarry VC, however, then concluded that there was “just cause” for breaching any rights relating to the confidential information in Malone’s telephone conversations. It is well settled that “[t]here is no confidence as to the disclosure of iniquity.”[148] On a similar basis, Megarry VC stated that the Crown was able to breach any rights in confidence on the basis that certain requirements were met to hold that there was a just cause for breaching rights in confidence. This included “that there should be grounds for suspecting that the tapping [would assist]... in detecting crime or discovering criminals.”[149] For the facts in *Malone*, it is clear that the Crown was tapping the accused’s telephone for the purpose of discovering criminal activity and dealing with any iniquity. Although the Crown was dealing with criminal activity in the *Malone* case, what about the historical examples of mail interception?

The declaration in 1590 by Elizabeth I made no distinction between mail that was suspected of criminal activity and mail that was not. As far as can be ascertained, all mail was intercepted and there was no need to consider if the mail contained iniquity. Similarly, in 1654 it appears that Cromwell intercepted all mail, not just mail that was suspected of containing iniquity. Rather than having a “just cause” for intercepting mail, letters were intercepted by the government arbitrarily. The case of *Malone*, therefore, does not assist in providing a defence to the Crown’s historical interception of mail. The Crown interfered with confidential information and did so without a proper defence. It is submitted, on this basis, that the interception of mail interfered with this right in equity, as it was potentially used to intercept and deal with confidential information.

Therefore, in the above circumstances, it cannot be said that this power was a mere capacity. For it was capable of interfering with legal rights of British subjects. To some extent, the prerogative must have permitted the executive to intercept mail.

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[146] *Malone v Metropolitan Police Commissioner* (n 76) 379.

[147] Bevan, “Is Anybody There?” 440.

[148] *Gartside v Outram*, 114 (Wood VC).

[149] *Malone v Metropolitan Police Commissioner* (n 76).

*Prerogative to Maintain the Defence of the Realm*

John Locke provided the earliest relevant work on British executive power after the Glorious Revolution.[150] Written in 1689, the work is important in outlining the stewardship model of executive power, giving an important and oft-cited definition of the royal prerogative (for the public good) and for positing that the common law can be dispensed with in emergencies.[151] Indeed, the notion of emergency is particularly important in most classical sources on the executive power and finds its origin in Locke.

Blackstone, amongst his many writings, canvassed the powers of the Crown.[152] Blackstone's definition, provided above is to be compared to A. V. Dicey's.[153] According to Dicey, the prerogative is exercisable by the Queen herself or by her Ministers and, accordingly, "[e]very act which the executive government can lawfully do without the authority of the Act of Parliament is done in virtue of this prerogative."[154] However, the author of this article prefers Blackstone's definition which states that the prerogative "can only be applied to those rights and capacities which the King enjoys alone, in contradiction to others, and not to those which he enjoys in common with any of his subjects."[155]

The difficulty with defining and researching elements of the royal prerogative is identifying the exact scope of their existence and power. Walter Bagehot, in *The English Constitution*, notes that any review of prerogative powers would conclude that the Crown holds many plenary powers which "waver between reality and desuetude, and which would cause a protracted and very interesting legal argument if... [the Crown] tried to exercise them."[156] One such power is that with respect to internal security, or keeping the peace of the realm.

The exact threshold for when the royal prerogative is enacted is difficult to ascertain. Nearly 150 years later, Joseph Chitty wrote that the "King may... do various acts growing out of sudden emergencies."[157] The emphasis on and acceptance of a state of emergency was critical for scholars such as John Allen in his *Inquiry into the Rise and Growth*

[150] Locke, *Second Treatise on Government*, 76.

[151] Locke, *Second Treatise on Government,* 76.

[152] Blackstone, *Commentaries*.

[153] Dicey, *Law of the Constitution*, 424.

[154] Dicey, *Law of the Constitution*, 425.

[155] Blackstone, *Commentaries*.

[156] Bagehot, *The English Constitution*, 49.

[157] Chitty, *Prerogatives of the Crown,* 49.

*of the Royal Prerogative*[158] and Arthur Berriedale Keith in his *The King and the Imperial Crown: The Powers and Duties of His Majesty*.[159] Allen went so far as to remark that emergencies could include abuse of monarchical power, relief from which included restoring peace to the realm through overthrowing the monarch.[160] Berriedale Keith was less emphatic, stating such operations were to support the Crown.[161] For the most part, however, classic sources on executive power are written from a unitary British perspective, and require an emergency to occur in order for the military to be deployed domestically. Classic sources on executive power do not engage with the effects of federalism on domestic security operations, nor engage with more recent case law which recognises a prerogative below the threshold of emergencies.

In Australia, federalism clearly shapes both law and debate. The first major work that addressed constitutional executive power was H. V. Evatt's doctoral thesis.[162] This work questions the manner in which the recent Federation had shaped the powers of the Crown in Australia, and made the argument that a nation which federated and became sovereign in turn had inherited the rights to declare war or peace, to annex and to colonise and other prerogatives that were at that time reserved still for Britain. It did not engage, however, with constitutional executive authority for domestic operations.

George Winterton's *Parliament, The Executive and the Governor-General*[163] hailed itself as the first publicly available monograph on the nature and ambit of constitutional executive power.[164] It was, in a specific manner, as Evatt's doctoral thesis was unpublished at the time. Winterton's major impact was the creation of the abovementioned tool for the analysis of constitutional executive power.

Winterton's position on the issues at hand was that the Commonwealth executive could only do what it could legislate for (i.e., under s 51 of the *Constitution*).[165] Public order being a state issue, the Commonwealth was constitutionally constrained from assisting.[166]

[158] Allen, *Inquiry into the Rise and Growth of the Royal Prerogative*.

[159] Keith, *The King and the Imperial Crown*.

[160] Allen, *Inquiry*, 87–88.

[161] Keith, *The King and Imperial Crown*, 107.

[162] Evatt, "The Royal Prerogative." The thesis has been published as Evatt, *The Royal Prerogative*.

[163] Winterton, *Parliament*.

[164] Winterton, *Parliament*, 1.

[165] Winterton, *Parliament*, 38.

[166] See *A-G (Cth) v Colonial Sugar*, 653–654 (Viscount Haldane LC, Lord Dunedin, Lord Shaw and Lord Moulton). See also Quick and Garran, *The Annotated Constitution of the Australian Commonwealth,* 964.

The tension between public order and defence was accurately captured by Anne Twomey.[167] Twomey illustrates that, since the first year of Federation, there has been tension in the management of what is a defence issue or a public order issue.[168] Twomey perhaps best represents the academic school that requires an emergency for Commonwealth intervention, in accordance with s 119 of the *Constitution.*

This conservative constitutional thinking came to the fore after the decision of *Ruddock v Vadarlis*. The case is particularly relevant in two ways: it is common law authority for armed troops to deploy in the off-shore area; and it was only a decision of the Full Federal Court. It has neither been overturned nor accepted by the High Court and academics have both praised[169] and criticised it.[170] Later High Court jurisprudence has avoided the case.[171] It further has inspired a generation of constitutional lawyers to inquire into the nature and ambit of the nationhood power, as a subset of constitutional executive power.[172]

Yet, almost no scholars have engaged, in Britain or Australia, with the relevance and viability of *Northumbria Police Authority.*[173] The facts of the case are as follows. In the early 1980s the United Kingdom’s Home Office centralised plastic batons and tear-gas rounds, to be made available to chief officers of police in situations of serious public disorder. In Home Officer Circular 40/1986, the Home Secretary announced that the store might be made available to those in need without the approval of the local police authority. This announcement displeased the Northumbria Police Authority, which applied for a declaration to the effect that that specific part of the circular was *ultra vires*.[174]

The case was first heard before a Divisional Court which found that the royal prerogative included a power to do whatever “was necessary to meet either an actual or

[167] Twomey, “Pushing the Boundaries of Executive Power,” 319–320.

[168] Twomey, *The Chameleon Crown*.

[169] Evans, “Developments: Australia,” 1; Crock, “In the Wake of the Tampa.”

[170] Bostock, “The International Legal Obligations owed to the Asylum Seekers on the MV Tampa”; Rothwell, “The Law of the Sea and the M/V Tampa Incident.”

[171] *CPCF v Minister for Immigration and Border Protection*.

[172] Gerangelos, “Section 61 of the *Commonwealth Constitution* and an ‘Historical Constitutional Approach’.” This approach is supported in Greentree, “The Commonwealth Executive Power:”; Stephenson, *Nationhood, Executive Power and the Australian Constitution*; Saunders, “Democracy, Liberty and the Prerogative,” 367; Condylis, “Debating the Nature and Ambit of the Commonwealth’s Non-Statutory Executive Power.”

[173] *R v Home Secretary: Ex parte Northumbria Police Authority* [1987] (n 113).

[174] *R v Home Secretary: Ex parte Northumbria Police Authority* [1987] (n 113).

an apprehended threat to the peace."[175] The Divisional Court moreover held that relevant statutory provisions (the *Police Act 1964*) did not "confer a monopoly power so as to limit the prerogative by implication."[176]

On appeal, the Court of Appeal of England and Wales Court upheld the primary decision, agreeing that the circular could be justified under the royal prerogative.[177] The Court of Appeal placed significant weight on the Crown's duty to keep those under its allegiance safe from physical attack within its dominions.[178] This duty was found to require a prerogative power and, importantly, was applicable at all times and not simply linked to emergencies. Arguing through the omission of evidence to the contrary, Nourse LJ opined that "a prerogative of keeping the peace within the realm existed in medieval times, probably since the Conquest [of William I]"[179] and that "there is no historical or other basis for denying to the war prerogative a sister prerogative of keeping the peace within the realm."[180]

Within the United Kingdom, the case came under some sporadic critique. One issue is the lack of historical justification for the finding that the prerogative exists, with Robert Ward arguing that the sources used to justify the Court's position in *Northumbria Police Authority* should result in "full marks to it for creative thinking" but that the result was erroneous.[181] Other British academics have accused the decision of being "more policy than principle."[182] Further still, the decision has been criticised as failing to mark the limits of the specific prerogative, and thus normatively undesirable.[183] Yet for the most part these criticisms are *lex ferenda*, rather than *lex lata*. It is clear that both the Divisional Court and the Court of Appeal believed that the Crown held a prerogative power to keep the peace of the realm, importantly, where no emergency exists. Considering that s 61 of the *Australian*

[175] *R v Home Secretary: Ex parte Northumbria Police Authority* [1987] (n 113) 999.

[176] *R v Home Secretary: Ex parte Northumbria Police Authority* [1987] (n 113) 999.

[177] *R v Home Secretary: Ex parte Northumbria Police Authority* [1989] (n 113).

[178] *R v Home Secretary: Ex parte Northumbria Police Authority* [1989] (n 113) 32.

[179] *R v Home Secretary: Ex parte Northumbria Police Authority* [1989] (n 113) 59.

[180] *R v Home Secretary: Ex parte Northumbria Police Authority* [1989] (n 113) 58.

[181] Ward, "Baton Rounds and Circulars," 156.

[182] Gearty, "The Courts and Recent Exercises of the Prerogative," 374. See also Vincenzi, *Crown Powers, Subjects and Citizens.*

[183] Ward, "Baton Rounds," 155–156. See further Payne, "The Royal Prerogative," 77.

*Constitution* is informed by the British common law,[184] it would appear common sense that, if an internal security prerogative has been affirmatively upheld within the United Kingdom (thereby being found to have existed in 1688), it thereby exists within Australia, regardless of the absence of case law to uphold this finding.[185] Literature prior to the case is therefore of very limited application.

Since 1989, within Australia, the case has barely been engaged with. Twomey made a fleeting mention to the case in 2010;[186] so too did Peta Stephenson as authority for the power to deploy domestically under the prerogative.[187] Zines perhaps engaged more fully in a single sentence when arguing that the case is normatively undesirable.[188] Cameron Moore, whose doctoral thesis and subsequent monograph explored the ambit of constitutional executive power and its interrelation with the ADF, accepted that a power existed outside of necessity for the ADF to deploy.[189] Moore however was unsure how *Northumbria Police Authority* would be operationalised in a federal context nor to what extent it had been abridged by statute.[190] So too did Peta Stephenson, a constitutional academic, recently accept that the power to keep the peace existed in Australia.[191] This case and its application within Australia was expansively discussed by the author of this article in a recent monograph titled *Keeping the Peace of the Realm*.[192] In it, the breadth and depth of the power to keep the peace was analysed and found to be synonymous with the war prerogative (that being plenary, subject to constitutional limits). With respect to reading mail, and its digital consequences, prerogative of keeping the peace provides the executive with the right to gather intelligence to keep the peace of the realm subject to common law limitations (such as *Entick v Carrington*).[193] *Entick,* however, can be distinguished as being concerned with private property.

[184] *Davis v Commonwealth* (n 2) 92 (Mason CJ, Deane and Gaudron JJ) quoted in *Pape v Commissioner of Taxation*, 62 (French CJ) and *Williams (No 1) v Commonwealth* (n 21) 372 (Kiefel J).

[185] Head, "Calling Out The Troops," 529.

[186] Twomey, "Pushing the Boundaries," 336.

[187] Stephenson, "The Relationship between the Royal Prerogative and Statute in Australia," 1028.

[188] Zines, "Inherent Executive Power of the Commonwealth," 287.

[189] Moore, *Crown and Sword*, 187–188.

[190] Moore, *Crown and Sword*, 187–188.

[191] Stephenson, "Royal Prerogative and Statute in Australia," 1001.

[192] White, *Keeping the Peace*. See also Ministry of Justice, *Review of the Executive Royal Prerogative Powers,* 26, n. 102; Cox, *Royal Prerogative and Constitutional Law*.

[193] *Entick v Carrington* (n 29).

*Prerogative to Open and Read Mail*

It is therefore clear that the prerogative to keep the peace does exist and does provide the executive with the power to gather intelligence through the mail. However, in situations existing outside of public emergencies and matters pertaining to defence, does the prerogative confer power to the executive to open and read mail? This requires concluding whether the right to open and read mail falls within the definition of the prerogative. As explained elsewhere, the author prefers Blackstone's test.[194] The question is therefore whether opening mail is a right "which the King enjoys alone, in contradiction to others, and not to those which he enjoys in common with any of his subjects."[195] To do so, one must look at the state of the royal prerogative in 1688. It is clear that the Crown has intercepted mail from as early as 1590,[196] both external (and later internal) to the Realm.[197] The Civil War saw the *ad hoc* interception become institutionalised. In 1663 the public was prohibited from opening and reading others mail and legislation prohibiting the public from opening mail recognised the Crown's right to open and read mail.[198] To that end, the conclusions of the 1957 Birkett Committee are misleading. Whilst the Committee refused to recognise the power to intercept mail as prerogative, believing it to be a power "recognised by statute," the report recognised the long usage of the custom as evidence of its legality.[199] This is prerogative power by any other name.

It is clear that a prerogative to read mail exists as a matter of law and legal history, being a well-exercised power at the time of the Glorious Revolution and applies as a matter of constitutional law in Australia. However, it is still pertinent to ascertain whether this right could adapt to be used to intercept modern forms of communication. The old prerogative may be useful if the government wishes to intercept mail, but it may not be as useful if the government wishes to intercept emails, text messages, and other forms of modern communication. While no new prerogatives can be created,[200] it is argued that the prerogative can adapt with time.[201] Therefore, it is necessary to ascertain whether the

[194] White, *Keeping the Peace*, 42.

[195] Blackstone, *Commentaries*.

[196] *Report from the Secret Committee* (n 55).

[197] Keenan, "Interception."

[198] Birkett Committee, *Report*, para. 9.

[199] Birkett Committee, *Report*, para. 50.

[200] George Winterton, "The Prerogative in Novel Situations."

[201] Winterton, "The Prerogative in Novel Situations," 408.

prerogative to open and read mail could adapt to the novel situation required to open and read online communications.

### So What? The Evolution of the Prerogative

The above has highlighted the difficulties in tracing prerogative power—which can be done through a combination of legal history and precedents. It is no easy task to identify a power, sporadically relied upon by the Crown, but within the remit of executive validity. The real question however, if one accepts such a prerogative existed in 1688, is how it evolves. Lord Sumner stated in *De Keyser’s Hotel* that “the prerogative adjusts itself to new discoveries.”[202] Noting many prerogatives are found within the executive realm of defence, peace and war, there are often clear examples: the development of command from naval and military forces to now include Air, Space and Cyber Commands in Commonwealth Defence Forces.

Yet within the national security realm, it is not as clear. In the above discussions around the power to read mail, does anything hinge on a distinction between intercepting (and so effectively seizing a letter), or opening, reading it, and then letting it be delivered? Opening, and intercepting seem to be used interchangeably. What is the impact of this on telephone tapping under the prerogative? Does the power to read mail even lay within the national security concept of prerogative power, or within the limb of Crown property rights? Once posted, does mail become the property of the Crown, and so does it follow that no prerogative power is required because it's merely the Crown dealing with its own property, but that of course, statute could explicitly remove this power? There is a hint of this line of thinking in discussing New Zealand, and within Australia.

This is all to say that having discovered a prerogative, it remains critical to understand how it legally evolves. In this aspect, however, the issue is most vexing. Determining how the prerogative adapts to novel situations, and the manner or scope in which the old prerogatives should adapt to novel situations is controversial.[203] There is no “set” test as to how this should occur. The author below outline two leading tests, which are labelled the “public policy” test and “originalism.” In this section, both tests are critically assessed for their legal validity, before offering a preferred test.

#### Public Policy Test

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[202] Winterton, “The Prerogative in Novel Situations,” 408; quoting *Attorney-General v De Keyser’s Hotel* (n 5).

[203] Winterton, “The Prerogative in Novel Situations,” 408–409.

Winterton opines that distinguishing between creation and adaption "may be a fine one."[204] He further notes that due to the speed with which legislation can grant executive power where thought necessary, and the ambiguity regarding judicial review of the prerogative power, courts should be careful when adapting the old prerogatives.[205] This latter warning is of less relevance since jurisprudential developments.[206]

Winterton in a short, but critical, article discussed whether the "questionable" prerogative to open and read mail could extend to telephone communications.[207] He states that although the objectives of intercepting mail and intercepting telephone communications are the same—to protect state security and to prevent crime—the senders' expectations are different, as telephone communications are not intended to fall into an unintended person's hands.[208] The author of this paper call this the "public policy" test. Without providing any further criteria, Winterton unilaterally holds any application of the prerogative to telegraphic services would be invalid.[209]

The author disagrees with Winterton's position. Although for some of a certain generation there might be an expectation of utter online privacy, the rise of social media and surveillance capitalism would suggest that all open-source data (including emails that are not encrypted) would be liable for data collection and assessment. There is a general expectation that communications outside of encrypted messaging services—such as WhatsApp or Telegram—are liable to interception. This includes emails, telephone calls, and video calls. The drive for privacy has led to the DarkWeb and other "off-grid" or private communication services. The author would suggest this is based on an implicit recognition that public utilities—such as the Internet—are still controlled by governments, even if the operationalisation has been privatized. Indeed, the interception of online communication is more common now than it was when Winterton wrote his theory.

Nevertheless, even if Winterton's points were to be accepted, the adaptation of the prerogative to novel situations is significantly different to that of telephone interception. Winterton's main contention, as discussed above, is that senders' expectations are different in the sense that telephone communications are not generally intended to fall

[204] Winterton, "The Prerogative in Novel Situations," 409.

[205] Winterton, "The Prerogative in Novel Situations," 409.

[206] *Minister for Arts, Heritage, and Environment v Peko-Wallsend*, 278 (Bowen CJ).

[207] Winterton, "The Prerogative in Novel Situations," 409.

[208] Winterton, "The Prerogative in Novel Situations," 409.

[209] Winterton, "The Prerogative in Novel Situations," 408–409.

into the government's possession. While this may be the case, this is not necessarily the same for an online context. Online content is generally considered, amongst the community, as being content that the public will likely be able to access.[210] Direct messages on social media apps, when critically assessed, are also accepted to be quasi-public. Again, the distinction between encrypted messaging services and unencrypted messaging services is important. The expectation being that an array of people will likely be able to view posted content, and it will likely be accessible, even if it is "private."[211] If the government were to intercept this content, the expectation would likely be that it is susceptible to such an interference. Therefore, perhaps the prerogative could adapt to the novel situation required to open and read online communications, to the extent that they are not encrypted. This would be consistent with historic practice under the prerogative, and community expectations.

Whilst Winterton's method of adapting the prerogative has been discussed by various academic papers,[212] at the time of writing it does not appear that any court has adopted the *public expectation* test to adapt the prerogative to novel situations. This might be because it just simply isn't how the prerogative legally evolves, notwithstanding that it should logically. Winterton's "public expectation" test does help to provide some clarity in relation to the evolution of the prerogative, but it is questionable whether it is an entirely accurate reflection of the law. The requirement that the public must accept the development of the Crown's power seems quite unorthodox for the evolution of law. Therefore, the progression of the prerogative could be grounded elsewhere, and it is appropriate to determine whether the prerogative to open and read mail could evolve to different forms of communication by using different methods. Examining case law pertaining to the evolution of the prerogative may help to provide clarity.

<u>Originalism</u>

[210] See Nissenbaum, "A Contextual Approach to Privacy Online," 32–34; McLane, "Social Media Rule #1: Everything posted online is public," published January 6, 2013, https://adammclane.com/2013/01/social-media-rule-number-one

[211] McLane, "Social Media Rule #1."

[212] See Gerangelos, "The Executive Power of the Commonwealth of Australia," 108; Condylis, "Debating the Commonwealth's Non-Statutory Executive Power," 427.

A case that discussed the issue was *Re a Petition of Right*, a UK matter that was disputed during WW1.[213] The suppliants were the owners of land used for the practice of aviation.[214] The Crown took possession of their land.[215] The issue in this case was whether the suppliants were entitled to compensation for the possession of their land.[216] They submitted on several grounds that they were entitled to compensation, and the Crown submitted on various grounds that they were not entitled to compensation. One of those grounds included whether the prerogative could adapt to the novel situation that was in dispute in this matter. Specifically, determining whether the prerogative could be used to take possession of an aerodrome free from any compensation, even though aerodromes were non-existent prior to the 1900s.[217] Warrington LJ phrased the question as whether the prerogative is limited to circumstances where the enemy is against the "soil" of the country.[218]

It was held that the Crown had a prerogative right to take possession of any man's land for the defence of the Commonwealth free from any compensation,[219] and could be used to take possession of an aerodrome, even though aerodromes were non-existent prior to the 1900s.[220] Warrington LJ stated that the prerogative must vary with the "advance of military science."[221] Noting that to limit it to the soil of the country would limit the prerogative practically useless for the *purpose* for which it was entrusted to the King.[222] Further qualifying that the only condition that must be satisfied to exercise the prerogative is that the act must be necessary for the public safety and defence of the realm, and that view must be formed in good faith.[223] Similarly, Lord Cozens-Hardy MR also held that the prerogative must change with the advancement of technology.[224] His Lordship

[213] *Re a Petition of Right*, 661 (Pickford LJ).

[214] *Re a Petition of Right* (n 218) 661.

[215] *Re a Petition of Right* (n 218) 661.

[216] *Re a Petition of Right* (n 218) 661.

[217] *Re a Petition of Right* (n 218) 660 (Lord Cozens-Hardy MR).

[218] *Re a Petition of Right* (n 218) 660.

[219] *Re a Petition of Right* (n 218) 666 (Warrington LJ).

[220] *Re a Petition of Right* (n 218) 660 (Lord Cozens-Hardy MR).

[221] *Re a Petition of Right* (n 218) 660.

[222] *Re a Petition of Right* (n 218) 660.

[223] *Re a Petition of Right* (n 218) 660.

[224] *Re a Petition of Right* (n 218) 660.

noted that the prerogative applied to what is reasonably necessary for preventing and repelling an invasion at the present time.[225]

It is submitted that the Court, in this matter, when ascertaining whether an action of the Crown was within the scope of the prerogative power did so by looking at the purpose for which the prerogative was entrusted to the King. Warrington LJ and Lord Cozens-Hardy MR noted that the prerogative was entrusted to the King for the public safety and defence of the realm. While aeroplanes were non-existent during the Glorious Revolution, taking possession of land for public safety and the defence of the realm did occur prior to the end of the Glorious Revolution. Since the aerodrome was taken for the defence of the realm, it was within the scope of the Crown's power.

Similarly, *De Keyser's Hotel* was a case regarding a petition seeking that the Crown provide compensation to the Respondent for taking possession of their hotel.[226] The Crown submitted, *inter alia,* that the alleged act was done pursuant to the prerogative, and therefore no compensation was due and payable.[227] One issue Lord Sumner dealt with was whether the prerogative could capture the conduct that was in dispute in the matter.[228] Specifically, whether the prerogative applied to the trespass that occurred, or whether it was stricter and only applied to actions within a "category of urgency."[229]

To deal with the issue, Lord Sumner stated that "with the progress of the art of war, the scope both of emergencies and of acts to be justified by emergency extends, and the prerogative adjusts itself to new discoveries."[230] However, some acts "are simply committed to the general administration of the Crown" and do not fall within the scope of the prerogative,[231] and the trespass that occurred in this matter fell within this category. It is submitted that Lord Sumner made this determination by ascertaining the purported purpose of the prerogative and then ascertaining whether the Crown's actions fell within that purpose. Lord Sumner held that the prerogative provides the Crown the right to intervene with private life in matters of urgency,[232] so matters of general administration do not fall within that purpose.

[225] *Re a Petition of Right* (n 218) 660.

[226] *Attorney-General v De Keyser's Hotel* (n 5) 555 (Lord Sumner).

[227] *Attorney-General v De Keyser's Hotel* (n 5) 555.

[228] *Attorney-General v De Keyser's Hotel* (n 5) 555.

[229] *Attorney-General v De Keyser's Hotel* (n 5) 565.

[230] *Attorney-General v De Keyser's Hotel* (n 5) 565.

[231] *Attorney-General v De Keyser's Hotel* (n 5) 565.

[232] *Attorney-General v De Keyser's Hotel* (n 5) 565.

Therefore, whether the prerogative can adapt to a novel situation requires ascertaining whether it is being exercised for the *purpose* for which it was entrusted to the Crown. Being a part of the common law,[233] judges can give effect to the purpose through case law. So long as the new conduct falls within the general purpose for which the prerogative was entrusted to the Crown, then the conduct falls within its parameters. If the purpose or objectives of the prerogative can be ascertained, then the parameters of it can be drawn. This method of interpretation is similar to the one described by Goldsworthy in his article "Originalism in Australia."[234]

Goldsworthy states that new discoveries can still be captured by the original meaning for which a provision was enacted if it falls within the purpose for which it was created.[235] To better describe this method, he uses the example of a swan. He submits that if there was a law that pertained to swans, and at the time the law was enacted all swans were white feathered, then a later-discovered black feathered swan would still be caught within the meaning of the provisions.[236] If the apparent purpose for which the provision was enacted was to regulate swans, then irrespective of the colour of the swan, all swans must be captured by its provisions.[237]

A similar view was also shared by the Birkett Committee while discussing adapting the prerogative to open and read mail (admittedly, they did not consider the concept of a digital swan). While discussing *Re a Petition of Right* in relation to adapting the scope of the prerogative they stated that

> The prerogative power in question in that case [*Re a Petition of Right*] was the power to take lands without compensation for the purposes of the Defence of the Realm, but if in the question we have to consider, the existence of a prerogative power to intercept all communications was established, the objection that the telephone was a modern invention would not defeat the application of the power.[238]

For the present issue at hand, if there was a prerogative that was entrusted to the Crown to read the general public's communications, and then new forms of communication were discovered, then those new forms of communication would have to be captured by the original prerogative. From mail to telegram to email to text messages, as communication

[233] *Jolley v Mainka* (, 281–282.

[234] Goldsworthy, "Originalism in Australia," 613.

[235] Goldsworthy, "Originalism in Australia," 613.

[236] Goldsworthy, "Originalism in Australia," 613.

[237] Goldsworthy, "Originalism in Australia," 613.

[238] Birkett Committee, *Report*, para. 43.

develops, so does the prerogative's scope to regulate those new discoveries. So then, this requires asking, what was the purpose of entrusting the Crown to open and read mail? If this question is answered, then it can be determined whether all forms of communication fall within the scope of the prerogative.

An analysis of history is necessary to determine the purpose for which the prerogative was exercised. The proclamation by Elizabeth I in 1590 appears to have directed the executive to intercept mail for the purpose of centralising the use of the Royal Postage service.[239] Additionally, the ordinance by Cromwell in 1654 appears to have directed the executive to intercept mail for the purpose of thwarting rebels.[240] This would restrict the scope of the exercise of the prerogative to matters pertaining to treason and preventing the use of private communication. However, in Bernard Keenan's thesis he quotes Samuel Morland, the first master-technician of letter interception, who said

> a skilful Prince ought to make watch towers of his General Post Office of all his kingdoms and there to place such careful Sentinels as that, by their gaze and diligence, he may have a constant view of all of any moment throughout the universe but more especially of the various tempers of his own subjects, and of the first ferments of all factions, without which it is morally impossible for him long to sit on his throne.[241]

On this view, although intercepting mail can be used to view the "the first ferments of all factions" it can also be used to "have a constant view of all of any moment throughout the universe" and to view "the various tempers of [the Crown's] subjects." It is not a matter which necessarily specifically pertains to thwarting rebels but may apply more broadly to gazing and retrieving information from the public generally. Therefore, so long as the government is intercepting communication for the purpose of understanding the tempers of the public, then it is supported by the prerogative to open and read mail. This view is supported by the 1657 Post Office Act which established the need for a post office on the basis of finding "intelligence" in the post.[242] This is broader than specific rebellious matters, but a need for the Post Office to be able to identify general intelligence from the public which could not be found except through the post.

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[239] *Report from the Secret Committee* (n 55).

[240] Keenan, "Interception."

[241] Keenan, "Interception," 66, quoting Samuel Morland (d. 1695), *A Brief Disclosure Concerning the Nature and Reason of Intelligence*.

[242] *An Act for setling the Postage of England, Scotland and Ireland 1657*.

A similar view was also held by the Birkett Committee. Finding that the purpose for creating a Crown monopoly in 1657 over the delivering of mail was done “with the object of enabling the Crown to inspect the contents of the letters carried.”[243] Rather than being completely restricted to specific matters, the purpose was to allow the Crown to have broad powers to inspect mail for various purposes, not simply to thwart rebels. The purpose of intercepting mail was to ensure that the Crown could have a constant view over all their subjects and gather intelligence that would not be available but in the mail.

Accordingly, if the government was intercepting text messages for the purpose of gathering intelligence from its subjects, then it would still fall within the ambit of the prerogative to open and read mail (so long as it was consistent with statutory regimes). So long as the government is exercising its power for the purpose of gathering intelligence, then the action would be lawful and conferred by the prerogative to open and read mail. Perhaps more appropriately, the prerogative to open and read mail should be referred to as the prerogative to intercept communications.

<u>Preferred Test</u>

Applying both originalism and the public policy test, the prerogative to open and read mail can and does expand to include new forms of communication. However, the question remains which test is more appropriate.

For the author of this paper, originalism is the preferred test. It is submitted that originalism is a more accurate reflection of the law and gives effect to the methodology applied by the courts to adapt the prerogative to novel situations. It follows wider common law methodologies of “always speaking,” which allows for the common law to advance with both social need and scientific advances.[244]

Although the public policy test does provide a useful means of adapting the prerogative, it seems quite odd for the power that “the King enjoys alone” to be controlled by his subjects’ temperaments. Rather, it is submitted that the Courts should adapt the prerogative to novel situations by examining the original purpose that the prerogative was entrusted to the Crown, or exercised by the Crown, and determine whether the novel situation falls within that purpose. Within constitutional monarchies, and as a result of the Glorious Revolution, Parliament ultimately decides which powers are to remain within the remit of non-statutory executive power. They can be confirmed, expanded, limited or

[243] Birkett Committee, *Report*, para. 31.

[244] *Lake Macquarie Shire Council v Aberdare County Council*, 331 (Barwick CJ).

abridged by legislation. Originalism, rather than a form of ancestor worship,[245] also results in the millennia old check-and-balance system of the royal prerogative. Responsible government, a pillar upon which Australian democracy stands, ultimately was developed in order to provide an effective check against excessive use of the plenary royal prerogative. Through either coarse or gentle review,[246] a constitutionally enshrined power is wielded responsibly. Applying Winterton's public policy test undermines this process.

Applying an originalism lens, the exercise of the prerogative to open and read mail resulted from a need for the Crown to gather intelligence from the public. It is therefore appropriate to adapt that prerogative to new forms of communication, so long as the Crown is only intercepting communication for intelligence gathering purposes. This position has been mirrored across the Commonwealth where the prerogative is operationalised.

## Conclusion

This paper has addressed the somewhat ubiquitous and novel prerogative to read the royal mail. It did so for two reasons. First, it provided a useful case study on the fine line between creating a new prerogative and recognising that the power has existed since 1688. To that end, and noting the prerogative is recognised but not created by the common law, similar jurisdictions across the Commonwealth can be used for comparative jurisprudence. What this paper has not done, however, is address the interplay between this prerogative and legislative frameworks—a rule of statutory construction that varies across the Commonwealth.[247] This is a critical but separate area for legal analysis.

What became apparent from this case study is how the prerogative of reading mail has been both resoundingly accepted, and dismissed, by various legal authorities over the past half decade. The confusion seems to have abated with the advent of statutory authority for warrants. Codification, it is true, brings clarity. It can also *extend* the depth of action taken under the prerogative. It is unclear just how far the prerogative powers can evolve from the medieval battlefield where they were forged, to the modern battlespace where they are wielded.[248] It is important and relevant that prerogatives in emergencies

[245] As argued in Kirby, "Constitutional Interpretation and Original Intent."

[246] Coarse being the historic basis of ministerial responsibility—execution. This has now shifted to gentle ministerial responsibility—dismissal.

[247] For a comparison of Australian and British case law, see White, *Keeping the Peace*.

[248] *Burmah Oil v Lord Advocate* (n 5).

short of war have not been authoritatively established[249] and have been described as "remarkably abstruse."[250] There is no definitive list of prerogatives, despite attempts to produce one,[251] and any discussion must necessarily delineate between prerogative powers that theoretically exist and those that are used in practice as Bagehot warned.[252]

Discussion of those "medieval chains" or "invisible inks" of the royal prerogative that use them to demonstrate its inconsistency with modern values fail to note the royal prerogative exists because it meets the recognised need for government responses to unforeseen circumstances.[253] One such example is a global pandemic, which left the many governments (including that of the Commonwealth of Australia) unable to sit and legislate. Niccolo Machiavelli foresaw such instances occurring nearly 500 years ago. In advising *The Prince*, Machiavelli opined:

> I hold it to be true that *Fortune* is the arbiter of one half of our actions, but that she still leaves us to direct the other half, or perhaps a little less... So it happens with *Fortune*, who shows her power where valour has not prepared to resist her, and thither she turns her forces where she knows that barriers and defences have not been raised to constrain her.[254]

The flexibility of the royal prerogative, and wider constitutional executive power, is not to be underestimated. It is also important to note that removing statutory frameworks sees the prerogative the re-emerge.[255] This occurred with the historical prerogative power to take ships in wartime which, when the statute was repealed, allowed ships to be requisitioned for the Falklands War;[256] or the revitalisation of the command prerogative power to move individual soldiers around the country without a statement of reasons.[257]

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[249] Saunders, "Inherent Executive Power"; Gerard Carney, "A Comment on How the Implied Freedom of Political Communication Restricts the Non-Statutory Executive Power."

[250] De Smith and Brazier, *Constitutional and Administrative Law*, 566.

[251] See Chitty, *Prerogatives of the Crown*. The closest that can be found is Ministry of Justice, *Review of the Executive Royal Prerogative Powers*, 26–27, which recognises a prerogative of internal security.

[252] Bagehot, *English Constitution*, 75.

[253] Cohn, "Medieval Chains, Invisible Inks."

[254] Machiavelli, *The Prince* page range missing.

[255] White, *Keeping the Peace,* 81–95; Vincenzi, *Crown Powers, Subjects and Citizens,* 25; *Martincevic v Commonwealth*.

[256] Vincenzi, *Crown Powers, Subjects and Citizens*.

[257] *Martincevic v Commonwealth* (n 258).

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